

REMARKS

The Examiner has stated "This application contains claims directed to the following patentably distinct species of the claimed invention: A. Figures 1,2; B. Figures 3,4; C. Figure 5; D. Figure 6; E. Figure 7; F. Figures 8; G. Figure 9. Upon election of the above-mentioned species Applicant is also directed to elect one of the following sub-species suitable for combination with the above species: aa. Figure 10; bb. Figure 11; cc. Figure 12; dd. Figure 13; ee. Figure 14; ff. Figure 15. Applicant is required under 35 USC 121 to elect a single disclosed species and/or sub-species for prosecution on the merits to which the claims shall be restricted if no generic claim is finally held to be allowable. Currently, there are no generic claims."

The applicant hereby traverses the Examiner's restriction/election requirement under Section 806.03 of the Manual of Patent Examining Procedure. Section 806.03 MPEP states "Where the claims of an application define the same essential characteristics of a single disclosed embodiment of an invention, restriction therebetween should never be required. This is because the claims are but different

variations of the same disclosed subject matter, varying in breadth or scope of definition."

In the present application all the claims deal with a housing which receives gas from a source and adds an agent and/or humidifying solution to the gas as it passes through the chamber and before entry into the patient.

For restriction under 35 USC 121 to be proper the Examiner must show that the inventions are independent and distinct. Under Section 806.04 MPEP an example is given of a proper showing of independent inventions, i.e., "two different combinations, not disclosed as capable of use together, having different modes of operation, different functions or different effects are independent. An article of apparel such as shoe and a locomotive bearing would be an example." This is simply not the relationship between the claimed subject matter in the present invention.

If the Examiner disagrees with the applicant and still finds the inventions to be distinct under the criteria of MPEP Sections 806.05(c)-806.05(a) the Examiner under MPEP Section 808.02 must, in order to establish reasons for insisting upon restriction, show by appropriate explanation one of the following: a) separate classification thereof; b) separate

status in the art when they are classified together; c) different fields of search are required and a serious burden is placed upon the Examiner. The Examiner has met none of these requirements and, therefore, the restriction requirement can not be upheld. Applicant courteously requests that it be withdrawn and all claims be searched together.

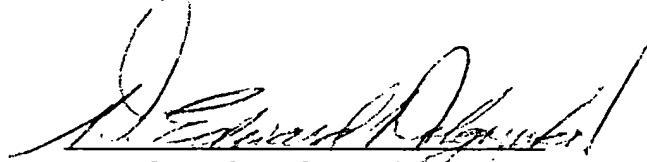
In accordance with the MPEP requirements, in case the Examiner disagrees with the Applicant, Applicant elects to prosecute the species shown in Figs. 1 and 2, and the sub-species shown in Fig. 10.

Further, should the Examiner maintain the restriction/election requirement, Applicant has presented new claims 97-100, corresponding substantially to independent claims 34, 55, and 76, which are believed to be generic. It is requested that these be examined with the elected species. It is believed that claim 90 could be substituted for claim 34 and be generic to all of claims 2-54.

It is suggested that claim 99 could be substituted for claim 55, and be generic to all of claims 56-75. Claim 100 could be substituted for claim 76, and make allowable all of claims 77-96. The Examiner is courteously invited to consider these extra claims.

Applicant, in view of the above amendments and remarks explanatory thereof, invite a favorable reconsideration of the present application. A telephone interview with the Examiner is invited to discuss the points raised in the present amendment and to facilitate prosecution of this application.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Edward Dolgorukov', is written over a horizontal line.

D. Edward Dolgorukov
Registration No. 28,266

ATTORNEYS
MARSHALL & MELHORN, LLC
Four SeaGate
Eighth Floor
Toledo, OH 43604
(419) 249-7146